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No. 86-1559

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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EDDIE BURRELL, *et al.*,
*Appellants*

v.

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, *et al.*,
*Appellees*

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**On Appeal from the United States District Court for the Southern District of Mississippi**

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## APPELLEES' MOTION TO AFFIRM OR DISMISS

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EDWIN LLOYD PITTMAN
Attorney General
State of Mississippi
T. HUNT COLE, JR.
(Counsel of Record)
ROBERT E. SANDERS
RICHARD G. JONES

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680
*Attorneys for Appellees*

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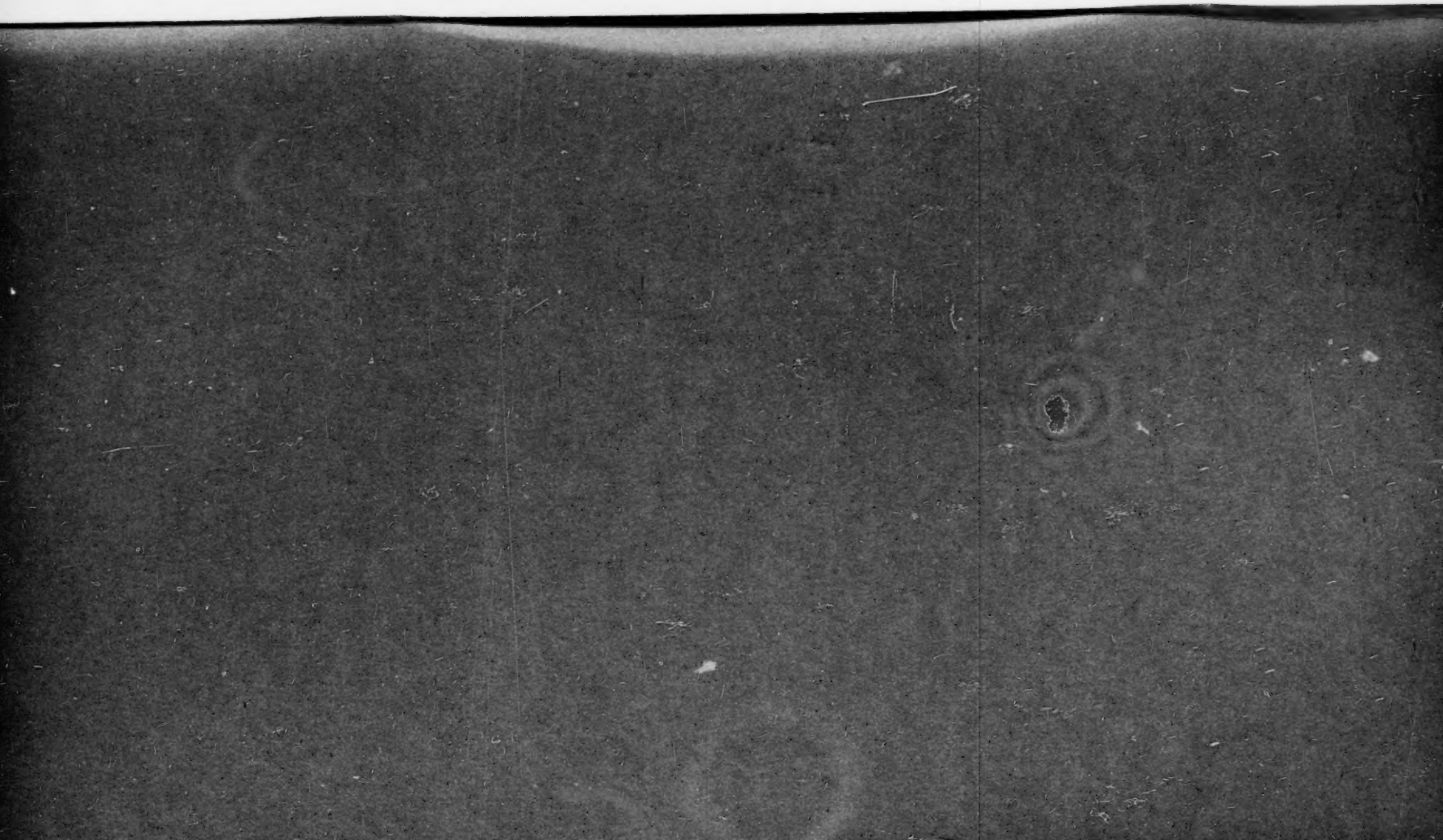


TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT OF THE CASE | 1 |
| ARGUMENT | 2 |
| I. The District Court's Refusal To Enjoin Or Vacate The Election On H.C.R. No. 41 Fell Squarely Within Its Remedial Discretion As Recognized In Prior § 5 Decisions Of This Court | 2 |
| II. The District Court Correctly Held That The Substantive Provisions Of H.C.R. No. 41 and H.B. No. 338 Do Not Constitute A "Standard, Practice, Or Procedure With Respect To Voting" Within The Meaning Of § 5 Of The Voting Rights Act | 9 |
| III. There Was No Proof Of A "Change" In The State Election Law Or Voting Practice Regarding The Contents Of Ballots Utilized In Some Counties On H.C.R. No. 41, Nor Did The Defendant State Officials Seek To Administer Any Change Within The Meaning Of § 5 | 15 |
| IV. The District Court Correctly Found That The Date Of Election Of H.C.R. No. 41 Did Not In Fact Cause A Denial Of Access To The Political Process | 21 |
| V. The Court Lacks Jurisdiction To Review The District Court's Findings As To The Appellant's Fourteenth Amendment Claims, And, In The Alternative, Those Findings Are Not Clearly Erroneous | 23 |
| VI. The Court Lacks Jurisdiction To Review The District Court's Purported Reliance On "Political Clout" As A Legitimate State Interest, And In Any Event The Question Appellants Seek To Pose Is Patently Insubstantial | 27 |
| CONCLUSION | 28 |
| SUPPLEMENTAL APPENDIX | SA-1 |

## TABLE OF AUTHORITIES

CASES Page

*Allen v. State Board of Elections*, 393 U.S. 544 (1969) ..... 2, 10, 11
*Anderson v. Bessemer City*, 470 U.S. 564 (1985) ..... 23, 24, 26
*Barnes v. Barnett*, 129 So.2d 638 (Miss. 1961) ..... 3
*Berry v. Doles*, 438 U.S. 190 (1978) ..... 2, 6, 7, 8
*Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973) ..... 24
*City of Lockhart v. United States*, 460 U.S. 125 (1983) ..... 3, 15, 16
*City of Rome v. United States*, 446 U.S. 156 (1980) ..... 14-15
*Dougherty County Bd. of Ed. v. White*, 439 U.S. 32 (1978) ..... 10
*Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981) ..... 24
*Georgia v. United States*, 411 U.S. 526 (1973) ..... 14
*Hardy v. Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985) ..... 12, 13, 14
*Henderson v. Graddick*, 641 F. Supp. (M.D. Ala. 1986) ..... 20
*Horry County v. United States*, 449 F. Supp. 990 (D.D.C. 1978) ..... 11
*Hunter v. Underwood*, 471 U.S. 222 (1985) ..... 26
*Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) ..... 28
*McCain v. Lybrand*, 465 U.S. 236, 79 L.Ed.2d 271 (1984) ..... 14
*Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) ..... 27
*Morris v. Gressette*, 432 U.S. 491 (1978) ..... 14
*NAACP v. Hampton County Election Comm.*, 470 U.S. 166 (1985) ..... 2, 8, 10
*Perkins v. Matthews*, 400 U.S. 379 (1971) ..... 2, 5, 15, 16, 19
*Pullman-Standard v. Swint*, 456 U.S. 273 (1982) ..... 26
*Rosario v. Rockerfeller*, 410 U.S. 752 (1973) ..... 22
*Salsburg v. Maryland*, 346 U.S. 545 (1954) ..... 28
*United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323 (5th Cir. 1979) ..... 24

TABLE OF AUTHORITIES—Continued

Page

*United States v. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978) ..... 13, 15, 16
*United States v. Board of Supervisors*, 429 U.S. 642 (1978) ..... 16
*United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 715 (1983) ..... 27
*United States v. St. Landry Parish Sch. Bd.*, 601 F.2d 859 (5th Cir. 1979) ..... 16, 19, 20
*University of Texas v. Camenisch*, 451 U.S. 390 (1981) ..... 4
*Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252 (1977) ..... 26, 27
*Welch v. McKenzie*, 765 F.2d 1311 (5th Cir. 1985) ..... 23
*Zobel v. Williams*, 457 U.S. 55 (1982) ..... 27

CONSTITUTION

U.S. Const., Amend. 14 ..... *passim*

FEDERAL STATUTES

28 U.S.C. § 1341 ..... 24
42 U.S.C. § 1971(a) ..... 15
42 U.S.C. § 1973 ..... 21, 22, 23
42 U.S.C. § 1973c ..... *passim*

STATE CONSTITUTIONAL PROVISIONS

Miss. Const., § 112 ..... 2
Miss. Const., § 273 ..... 3
H.C.R. No. 41 (1986) ..... *passim*
S.C.R. No. 519 (1982) ..... *passim*

STATE STATUTES

H.B. No. 388 (1986) ..... *passim*
Miss. Code Ann. § 23-5-3 (1972) ..... 17, 21
Miss. Code Ann. § 23-5-123 (1972) ..... 21
Miss. Code Ann. § 23-5-139 (1972) ..... 18
Miss. Code Ann. § 23-5-141 (1972) ..... 18
Miss. Code Ann. § 23-5-142 (1972) ..... 18

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| Miss. Code Ann. § 23-5-151 (1972) | 18 |
| Miss. Code Ann. § 23-7-1 (1972) | 20 |
| Miss. Code Ann. § 23-7-3 (1972) | 20 |
| Miss. Code Ann. § 23-7-5 (1972) | 20 |
| Miss. Code Ann. § 23-7-9 (1972) | 20, 21 |
| Miss. Code Ann. § 23-7-21 (1972) | 21 |
| Miss. Code Ann. § 23-7-301 (1972) | 20 |
| Miss. Code Ann. § 23-7-303 (1972) | 20 |
| Miss. Code Ann. § 23-7-307 (1972) | 20 |
| Miss. Code Ann. § 23-7-309 (1972) | 21 |
| Miss. Code Ann. § 23-7-311 (1972) | 21 |
| **OTHER AUTHORITIES** | |
| F.R. Civ. P. Rule 52(a) | 26 |
| 28 C.F.R. § 51.12 (1986) | 10 |
| Senate Report, Vol. 2 1982 U.S. Code Cong. and Adm. News p. 207 | 23 |
| 52 Fed. Reg. 486 (1987) | 10 |

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## APPELLEES' MOTION TO AFFIRM OR DISMISS

---

Pursuant to Rule 16.1, the appellees move to affirm the judgment of the district court on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as to need no further argument, or in the alternative, to dismiss the appeal for lack of jurisdiction as may be appropriate.

## STATEMENT OF THE CASE

A basic statement of the case, including a brief description of the tax legislation in question and the historical background and circumstances surrounding its passage, is set forth in the unreported opinion of the three-judge district court, App. A at 2a-4a. Specific aspects of the district court's rulings are discussed in the applicable section of the Argument portion of this Motion. Those sections correspond to the Questions Presented in the appellants' Jurisdictional Statement.

## ARGUMENT

### I. THE DISTRICT COURT'S REFUSAL TO ENJOIN OR VACATE THE ELECTION ON H.C.R. NO. 41 FELL SQUARELY WITHIN ITS REMEDIAL DISCRETION AS RECOGNIZED IN PRIOR § 5 DECISIONS OF THIS COURT.

In at least four opinions since 1969, this Court has considered the issue of an appropriate remedy in private actions for injuncitve relief brought under § 5 of the Voting Rights Act. *Allen v. State Board of Elections*, 393 U.S. 544, 571-572 (1969); *Perkins v. Matthews*, 400 U.S. 379, 395-397 (1971); *Berry v. Doles*, 438 U.S. 190 (1978); *NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 181-183 (1985). The action of the three-judge district court in this case falls squarely and manifestly within the controlling principles and guidelines established by those decisions of the Court, and in particular *Berry v. Doles*. To the extent that the appellants pose the argument that a district court must *always* enjoin an upcoming election, or subsequently set aside the results thereof, without the exercise of any equitable discretion whatsoever, such argument is plainly foreclosed by those cases. For the reasons set forth below, further briefing or argument regarding this question is not warranted.

A brief summary of the posture of the case and the remedial action taken below may prove helpful to the Court.

The property tax measure embodied in House Concurrent Resolution No. 41 was passed by the Mississippi Legislature on April 2, 1986. The substance of this proposed amendment to § 112 of the Mississippi Constitution of 1890 contained two aspects relating to ad valorem taxation: first, it modified the number of classes of property and assessment ratios for taxation purposes; and second, it specifically provided that the Legislature could deny or limit a situs county of other taxing authority the right

to levy ad valorem taxes upon a nuclear power plant and could instead establish an alternative mode of valuation, assessment, levy, and revenue distribution. In addition to these substantive provisions, H.C.R. No. 41, as provided for in § 273 of the Mississippi Constitution of 1890, also contained a "date of election" component which fixed the date for submission of the proposed measure to the voters of the State for ratification or rejection as June 3, 1986.[1]

On May 6, 1986, the Mississippi Attorney General submitted the date of the ratification election on H.C.R. No. 41 to the Justice Department for approval under § 5 and requested expedited consideration. On May 23, eleven days before the scheduled election, the appellants filed their initial complaint and a Motion for Preliminary Injunction in which they alleged that the date of election on H.C.R. No. 41 had not been approved under § 5 and requested that the district court enjoin the election. A three-judge district court was rapidly convened and an evidentiary hearing on the motion for preliminary injunction was conducted on May 30, 1986. In accordance with the analytical framework articulated in *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983),[2]

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[1] Section 273 of the Constitution states in part that the Legislature's concurrent resolution on a proposed amendment "may fix the date and direct the calling of elections for the purposes thereof." The June 3 date coincided with the Democratic party primary elections. Under Mississippi case law, the utilization of a date other than the November general elections was permissible, see *Barnes v. Barnett*, 129 So.2d 638 (Miss. 1961). As found by the district court, the reason for a June election date with respect to H.C.R. No. 41 was to avoid delaying the effective implementation of the general reclassification provisions of that amendment until the 1988 tax year if ratified.

[2] In a § 5 injunction action, the issues for determination by the district court as set forth in *Lockhart* are:

> (i) whether a change [is] covered by § 5, (ii) if the change is covered, whether § 5 approval requirements [have been] satisfied, and (iii) if the requirements [have not been satisfied], what relief [is] appropriate.

the district court in its May 30, 1986, bench opinion and written order on preliminary relief determined: (1) that although there was no "change" in an election statute regarding the date of election, the setting of a June, rather than a November, date of election for H.C.R. No. 41 in fact constituted a deviation from the predominant past practice of holding ratification elections in November,[3] and thus was a change in a voting "practice" covered by § 5; (2) that although the date of election had been submitted to the Justice Department on May 6, 1986, for preclearance, the Attorney General had not indicated whether he would object to, or approve, the June date; and (3) that under the circumstances, the June 3 ratification election would not be enjoined, but that the implementation of H.C.R. No. 41 would be enjoined until the June date had been approved by the Attorney General or by the United States District Court for the District of Columbia pursuant to § 5.[4] App. E at 37a; F at 42a.

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[3] The appellants suggest in a footnote that the district court should be summarily reversed with respect to the § 5 date-of-election issue as to the 1982 tax amendment embodied in S.C.R. No. 519. Juris. Stat. at 7 n.6. That suggestion illustrates the unsupported nature of many claims and positions asserted by appellants throughout their brief. The 1982 election was *in fact conducted in November*, in accordance with the predominant practice found by the district court. See S.C.R. No. 519, App. at 73a, 75a. There was no "change" for § 5 purposes.

[4] As even a casual perusal of the district court's opinion and order on the motion for preliminary relief reveals, the Court took into account a number of factors in refusing to enjoin the holding of the June 3 election. *See University of Texas v. Camenisch*, 451 U.S. 390 (1981). In choosing an appropriate remedy, the district court observed, *inter alia*, that it was presented with no evidence of any racial implications regarding the June election date, that a delay in the ratification election would inevitably result in a delay in the implementation of the property tax provisions of H.C.R. No. 41, that the § 5 violation was not "flagrant" or due to any "deliberate evasion" on the part of the appellee, that the state had an arguable reason that the change was not subject

On July 7, 1986, the Attorney General approved the June 3 election date under § 5, and on July 10, 1986 the district court dissolved its preliminary injunction of the implementation of H.C.R. No. 41. By the time the action came on for an expedited trial on the merits in November 1986, the plaintiffs had added, among other things, a claim that the June date of election violated the substantive provisions of § 2 of the Voting Rights Act, and the request for relief had necessarily changed into a request that the results of the June election be set aside or vacated. In its opinion after the trial on the merits, the three-judge court observed that any remaining issues regarding relief under § 5 would be considered in conjunction with the alleged violation of § 2, and it ultimately concluded that the June date-of-election did not in fact violate § 2. It thus refused to set aside the June election.

The appellants' basic premise as set forth in their Jurisdictional Statement, i.e., that a district court which has determined that a change in voting procedures for which § 5 approval has not yet been obtained has no discretion to fashion any remedy except to enjoin or set aside an election conducted thereunder—is flatly contrary to opinions of this Court. In *Perkins v. Matthews*, 400 U.S. 379 (1971), a municipality expanded its boundaries and changed from a ward system of municipal elections to an at-large system without submitting the changes for approval under § 5. A three-judge district court refused the plaintiffs' request to enjoin elections to be conducted under the new system, and the municipality held the elections. On appeal to this Court, the plaintiffs specifically argued that the elections should be set aside. 400 U.S. at 396. The Court refused to establish a per se rule

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to preclearance, and that the rights of the plaintiffs could be adequately protected by enjoining the implementation of H.C.R. No. 41 until such time as the date of election was properly approved under § 5.

which would require a district court to set aside an election whenever a violation of § 5 was demonstrated:

> [W]e recognize that, in determining the appropriate remedy, other factors may be relevant, such as the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by § 5. In certain circumstances, for example, it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming.

The flexibility to fashion an appropriate equitable remedy for § 5 violations was further recognized in *Berry v. Doles*, 438 U.S. 190 (1978), the decision which controls this case and which compels the summary affirmance of the district court regarding this issue. In *Berry*, the State of Georgia sought to conduct elections in 1976 for a county board pursuant to a 1968 statute which had not been submitted for approval under § 5 and which in essence changed the terms of office for members of the board. The district court refused to enjoin the upcoming elections.[5] After the elections were held, the three-judge court found a violation of § 5 and enjoined enforcement of the 1968 statute until such time as defendants effected compliance with § 5. The district court, however, rejected the plaintiffs' request to set aside the elections, noting "the rather technical changes" made in the election law and "the apparent lack of any discriminatory purpose or effect surrounding the use of the law in the 1976 elections." 438 U.S. at 191.

On appeal, this Court affirmed the district court's refusal to set aside the election. Accordingly, in the context of *fashioning a remedy* for a § 5 violation, this Court has, contrary to the position taken by appellants in their

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[5] See 438 U.S. at 197 (Powell, J., concurring).

Jurisdictional Statement, refused to disturb the judgment of a district court based in part on the lack of apparent racial implications of the change. However, since the change in law had still not been submitted for approval under § 5, the Court remanded to the district court for the entry of an order which would allow the appellee 30 days in which to submit the change to the appropriate authorities for approval:

> We conclude that the requirement of federal scrutiny imposed by § 5 should be satisfied by appellees without further delay. Accordingly, we adopt the suggestion of the United States that the District Court should enter an order allowing appellees 30 days within which to apply for approval of the 1968 voting change. *If approval is obtained the matter will be at an end.*

438 U.S. at 192-193 (emphasis supplied).

Here, as in *Berry*, the district court enjoined implementation of the subject measure (H.C.R. No. 41) until the date the ratification of election had received approval of the proper authorities under § 5; indeed, the further affirmative remedy imposed in *Berry* was unnecessary in the instant case because the state had *in fact already submitted the June date of election for approval prior to the litigation.*[6] Most importantly, the Attorney General *in fact approved* the date of election under § 5 on July 7, 1986. As stated in *Berry*, this put the matter "at an end" for § 5 purposes. Had the Attorney General instead objected to the date of the election, and approval could not be subsequently obtained from the United States District Court for the District of Columbia, the question of a remedy in the district court would have

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[6] To reiterate, H.C.R. No. 41 with a June 3, 1986, date-of-election component was passed on April 2, 1986. The Mississippi Attorney General submitted the date of election for approval on May 6; the complaint and motion for injunction were filed on May 23 and were heard by the Court on May 30.

been quite different. Those, however, are not the facts confronting the Court in this case.

Most recently, in *NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 181-183 (1985), the Court again reaffirmed the basic vitality of the *Berry* remedy, but ordered that a modified, more stringent, *Berry* remedy be imposed to fit the different posture of the case. In *Hampton County*, the district court erred by concluding that a change in candidate filing periods along with a changed date-of-election were not covered by the approval requirements of § 5, and by further concluding in the alternative that the change had been submitted and had received approval under § 5. The Court held that the appropriate remedy under those circumstances was (1) to allow the appellee 30 days to submit the change for approval; (2) if approval was not forthcoming, to set aside the election; and (3) if approval was obtained from the Attorney General, the district court then "should determine, in the exercise of its equitable discretion" whether the election should stand. 470 U.S. at 182-183. As made plain in footnote 36 of the Court's opinion, the additional post-approval exercise of the district court's remedial discretion was required because in *Hampton*, unlike *Berry*, the district court had never "reached the question of an appropriate remedy" and had "never engaged in the equitable weighing process necessary to determine whether failure to submit a covered change requires that an election be set aside." 470 U.S. at 183 n.36. The three-judge court in the instant case, as in *Berry*, had considered and reached the question of an appropriate remedy.

The district court's remedial action in this § 5 case fell squarely within the parameters established by this Court, and for the foregoing reasons, the question sought to be posed by appellants is plainly insubstantial and does not warrant further argument.

## II. THE DISTRICT COURT CORRECTLY HELD THAT THE SUBSTANTIVE PROVISIONS OF H.C.R. NO. 41 AND H.B. NO. 388 DO NOT CONSTITUTE A "STANDARD, PRACTICE, OR PROCEDURE WITH RESPECT TO VOTING" WITHIN THE MEANING OF § 5 OF THE VOTING RIGHTS ACT.

By its express terms, § 5 of the Voting Rights Act requires designated states and political subdivisions to submit only a proposed change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" to federal authorities for advance review prior to the implementation of same. 42 U.S.C. § 1973c.

The appellants in their Third Amended Complaint alleged in conclusory fashion that the *substantive provisions* of the property tax amendment in H.C.R. No. 41 and the Grand Gulf taxation measure passed by the Legislature as H.B. No. 388 constituted a "standard, practice, or procedure with respect to voting" within the meaning of § 5. In essence, they contended that the substantive "withdrawal" of the authority of a situs county (i.e. Claiborne County) to levy ad valorem taxes on a nuclear power plant (Grand Gulf) and the substitution of an in lieu system of levy, assessment, and tax revenue distribution effectuated by these measures were thus covered under § 5 and were required to be submitted for preclearance. The three-judge district court held as a matter of law that neither H.B. No. 388 nor H.C.R. No. 41 constituted voting practices covered by § 5.[7]

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[7] While the district court orders are cursory, App. A at 6a; G at 47a, this issue was extensively briefed by both appellants and appellees in regard to appellees' motion for summary judgment in the lower court. There, as here, the appellants relied on their view of the *Hardy* and *Horry County* cases, and the appellees relied on the same basic arguments now presented to the Court in this motion to affirm.

Given the nature of the tax measures at issue, the district court's ruling is so plainly correct that further argument before this Court is not warranted. Put simply, neither the statutory language nor any opinion of this Court suggests that the substantive text of these property tax and tax-distribution measures constitute, either directly or indirectly, a change in a "standard, practice, or procedure *with respect to voting*" as required for coverage under § 5. Appellees do not question, and did not question before the district court, the general proposition that this statutory language is to be given a broad construction. *E.g., Allen v. Board of Elections*, 393 U.S. 544, 567 (1969) (Congress intended to give language "broadest possible scope"); *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32, 37-40 (1978). No case, however, has held or suggested that the term "standard, practice, or procedure with respect to voting" is simply open-ended and can be permissibly applied to require designated jurisdictions to submit any and all enactments, regardless of substance, to federal authorities for preclearance. The substance of the tax provisions at issue have no nexus to voting.

In this regard, the construction of the scope of § 5 by the Attorney General takes on special significance. As the Court has repeatedly observed, the Attorney General's interpretation of § 5 is entitled to considerable deference because of his extensive role in drafting the statute and explaining its operation to Congress. *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 179, n.29 (1985); *Dougherty County*, 439 U.S. at 39. With respect to the type of changes that affect voting and are covered by § 5, the Attorney General has set forth an extensive list of examples in 28 C.F.R. § 51.12 (1986).[8] That list

[8] By final rule published January 6, 1987, 28 C.F.R. Part 51 was revised by the Department of Justice. 52 Fed. Reg. 486. Section 51.12 (1986) was renumbered in the revised rule and currently appears as § 51.13 without any change in content. See 52 Fed. Reg. at 492.

of examples is set forth in the appellees' Supplemental Appendix A, SA-1. While the Attorney General's list of "changes" that are subject to § 5 does not purport to be all-inclusive, it does provide clear guidance to designated jurisdictions as to those matters upon which preclearance must be sought, and presumptively represents the intent and understanding of Congress as to those "standards, practices or procedures with respect to voting" that are subject to the Act. The substantive provisions of H.C.R. No. 41 and H.B. No. 388 *simply do not fit into any* of the examples given in the Regulation, either logically, practically, or otherwise.

The district court cases upon which appellants rely in their Jurisdictional Statement at pp. 12-13 are not, as appellants suggest, "precedent" in any meaningful sense, nor do they in fact conflict with the decision of the district court with regard to the enactments at issue here. The broad language quoted from *Horry County v. United States*, 449 F.Supp. 990, 995 (D.D.C. 1978) is dictum.[9]

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[9] *Horry County* involved the implementation of "home rule" legislation in a South Carolina county. Prior to the legislation, the Governor appointed the members of the county commission and all major governmental functions were conducted by the county's local legislators; after the change, a council-administrator form of government was established, with an elected "county council" which had a different number of members and different terms of office. 490 F.Supp. at 993-994. The district court observed in dictum that "an alternate reason for subjecting the Horry County governing body to Section 5 preclearance is that the change involved reallocates governmental powers among elected officials voted upon by different constituencies." 449 F.Supp. at 995. The basic holding of the case, however, is that the change in the *method of selection* of county officials from appointed to elected was a voting standard, practice, or procedure covered by § 5. This basic holding was a clearly understandable corollary to the principle that a change in selection method from elected to appointed is covered by § 5 and was a proposition implicitly supported in *Allen v. State Board of*

Moreover, *Hardy v. Wallace*, 603 F.Supp. 174 (M.D. Ala. 1985) is a case that, by its own term, is *sui generis*, see 603 F.Supp. at 179.

In *Hardy*, the Alabama legislature passed an act which authorized pari-mutual betting on dog racing in Greene County, a county with a predominantly black population, and which authorized, *inter alia*, the creation of a three-member racing commission which would be appointed by the local state legislators that represented the county in the legislature. This 1975 Act was conditioned upon an affirmative vote by the citizens of Greene County and received approval in a referendum election held in the county. Several years later, after the Alabama legislature was reapportioned so that it was likely that black candidates would be elected to the legislature from Greene County, the Alabama legislature in 1983 passed an act which amended the 1975 Act to provide that the Governor, rather than the local legislative delegation, would appoint the members of the county racing commission. Both the 1975 Act and the 1983 Act were submitted by Alabama to the Attorney General under § 5. After initially interposing an objection, *see* 603 F. Supp. at 179, the Attorney General upon reconsideration withdrew his objection and held that the transfer of appointment power from the local legislators to the Governor was not a change in a standard, practice or procedure with respect to voting and that the Attorney General was accordingly without authority to review the change. 603 F.Supp. at 181. For the amalgam of reasons set forth therein, the district court nevertheless concluded that the change was covered under § 5.

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*Elections*, 393 U.S. 544 (1969), and directly supported by the Attorney General's interpretation of § 5. The "alternate reason" given by the district court, for which no direct authority in support was cited, was not essential to the judgment and, to appellees' knowledge, has not been followed or endorsed by any federal court other than *Hardy, supra*.

The legal analysis and reasoning employed by the district court in *Hardy* is curious and appears to be flawed.[10] It is unnecessary, however, to dissect that decision—which itself refused to espouse any far-reaching view of the law and was decided "within the ambit of its peculiar facts"—to observe the material distinctions that exist as compared to the instant case. In *Hardy*, there was a transfer of *appointment power* from the locally-elected legislative delegation to the governor. Prior to the change, the voters of Greene County had an indirect say-so, through their local legislative delegation, as to *who* would serve in the county racing commissioner positions. In this sense, *Hardy* represents an extension, correct or incorrect, of the line of cases that hold that a change from elected to appointed officials, or from appointed to elected officials, are practices affecting voting within the scope of § 5. In the instant case, neither H.B. No. 388, nor H.C.R. No. 41 makes *any change whatsoever in who will be appointed or elected to any position in Claiborne County*, or the method of selection, by appointment or otherwise, for any such position. To the extent that H.B. No. 388 withdraws from the supervisors of a situs county the authority to tax a nuclear power plant and substitutes an in lieu system

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[10] The district court, for example, placed considerable emphasis upon the "alternate reasoning" given by the District of Columbia court in *Horry County* because of the defense afforded "*agencies* charged with the administration of the Voting Rights Act." 603 F.Supp. at 177 (emphasis supplied). As numerous decisions of this Court make clear, however, it is the *Attorney General's* administrative interpretation of the scope of § 5 which is accorded great deference due to his extensive role in "drafting the statute and explaining its operation to Congress." *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 131 (1978). The judges of the United States District Court for the District of Columbia obviously played no such role. Moreover, notwithstanding the Attorney General's specific withdrawal of his objection to the subject legislation, the district court in *Hardy* ruled, without explanation, that the "denial of § 5 coverage" by the Attorney General did not constitute "compliance with § 5" or "preclearance by the Attorney General." 603 F.Supp. at 177, and proceeded to second

of levy and distribution, it nevertheless does not change *any aspect* of the other powers exercised by the duly elected officials of that county or in any manner infringe upon the voting rights of the residents. Thus, this case is plainly distinguishable, both under the rationale of the district court in *Hardy* and under the Attorney General's interpretation of the scope of § 5 as expressed in *Hardy*, *see* 603 F.Supp. at 181.

A second factor crucial to the district court's conclusion in *Hardy* was the fact that the scheme of indirect control over the appointees to the county racing commission had been initially put in place by a vote of the county residents themselves and had been reversed by the change. 603 F.Supp. at 179; at 175. In the instant case, the historical scheme of ad valorem property taxation by counties is a creature of state law, passed by legislators elected on a statewide basis. No county, including Claiborne, has had veto or approval power over whether it wished to be a part of the overall scheme, nor has any countywide referendum ever been held in such regard.

In summary, the substance of the property tax enactments challenged in this case do not fall within the relevant language of § 5 as construed by the Court, the Attorney General, or any other authoritative source. Even within its proper purview, i.e. changes in laws or procedures "with respect to voting", this Court and various justices thereof have repeatedly observed that the advance review requirement of § 5 is an extraordinary remedy and represents a serious intrusion into state sovereignty and a substantial departure from ordinary concepts of our system of federalism. *See McCain v. Lybrand*, 465 U.S. 236, 244-245 (1984); *Georgia v. United States*, 411 U.S. 526, 542, 545 (1973) (opinions of White, J., and Powell, J., dissenting); *City of Rome v. United States*,

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guess his determination. Such judicial review of the Attorney General's actions is, of course, precluded under the scheme of § 5. See *Morris v. Gressette*, 432 U.S. 491 (1978).

446 U.S. 156, 201-202 (opinion of Powell, J., dissenting); *Board of Commissioners of Sheffield*, 435 U.S. at 140 (opinion of Stevens, J., dissenting). While the facial validity of § 5 has been upheld, *see City of Rome*, defendants submit that an application of those requirements to the substantive tax measures embodied in H.C.R. No. 41 and H.B. No. 388 would raise serious questions of the constitutionality of § 5 as applied, and would make it virtually impossible for a designated jurisdiction, which can now basically rely upon the Attorney General's regulations for guidance, to determine which enactments, if any, do not require advance federal review.

Appellees submit the district court's ruling is plainly correct and that it does not implicate or contravene any line of precedent of this Court regarding the scope of § 5. No patent conflict currently exists among the lower federal courts which would warrant or require guidance from the Court at this juncture. Appellees submit that the question is insubstantial and that summary affirmance is appropriate.

## III. THERE WAS NO PROOF OF A "CHANGE" IN THE STATE ELECTION LAW OR VOTING PRACTICE REGARDING THE CONTENTS OF BALLOTS UTILIZED IN SOME COUNTIES ON H.C.R. NO. 41, NOR DID THE DEFENDANT STATE OFFICIALS SEEK TO ADMINISTER ANY CHANGE WITHIN THE MEANING OF § 5.

It is well-settled that some abstract violation of a state election law or voting procedure does not, in and of itself, constitute a "change" within the scope of § 5 so as to be subject to the advance review requirements of that particular section to the Voting Rights Act. *Perkins v. Matthews*, 400 U.S. 379, 394-395 (1971); *City of Lockhart v. United States*, 460 U.S. 125, 132-133 (1983). Unlike other sections of the Voting Rights Act, e.g. § 2 of the Act, 42 U.S. § 1973, 42 U.S.C. § 1971(a), traditional challenges under the Fifteenth Amendment, or various state election remedies, § 5 focuses upon whether there

has been in fact a change in the election law or practices that are different from that which were "in force or effect on November 1, 1964"—the date that serves as a benchmark for comparison purposes.[11] *Id.; United States v. Board of Supervisors*, 429 U.S. 642, 646 n.3 (1978) (§ 5 is addressed "only to voting procedures that were not in effect on November 1, 1964."). In determining whether a covered change has occurred for § 5 purposes, state law may in some circumstances be relevant,[12] or, as indicated by *Perkins* and *Lockhart*, may be totally irrelevant; the true test is a comparison of the election procedure that "would have been followed if the election had been held on [November 1, 1964]" and that which in fact was followed. *Perkins*, 400 U.S. at 394. Moreover, the change in a law or practice with the respect to voting must be one which, under the express language of § 5, a designated state or a political unit within that state[13] "shall enact or seek to administer. . . ." 42 U.S.C. § 1973c; see *United States v. Saint Landry Parish Sch. Bd.*, 601 F.2d 859, 863 (5th Cir. 1979).

The foregoing basic principles, which are central to the scheme of § 5 and to the scope of its reach, are dispositive of the question sought to be raised by appellants in their Jurisdictional Statement at pp. 14-16.

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[11] As Judge Goldberg of the Fifth Circuit wrote in *United States v. St. Landry Parish Sch. Bd.*, 601 F.2d 859 (5th Cir. 1979): "Section 5 has its own political cosmos, but it does not possess a universality with respect to every electoral aberration."

[12] A post-coverage amendment to a pre-1964 law with respect to voting, for example, may itself indisputably constitute the change. This is not that kind of case.

[13] *See United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 127 (1978) (§ 5 applies "not only to governmental entities formally acting in the name of the State, but also to those political units that may exercise control over critical aspects of the voting process").

In the district court, appellants' § 5 claim in this regard derived from Count IV of their Second Amended Complaint; that count alleged that at the June 1986 Special Election on H.C.R. No. 41, the "ballots and ballot labels in use on *certain* voting machines and electronic voting systems in *certain* counties did not contain the entire text of H.C.R. No. 41 . . . but rather only included the title of H.C.R. No. 41" (emphasis supplied). The complaint further alleged, in conclusory § 5 terminology, that this deviated from a custom or practice required by state law and that "defendants Allain, Pittman, Molpus, and State Board of Election Commissioners administered the change" without having having first obtained preclearance

The relevant state law of Mississippi regarding the content of ballots, either as approved by the Attorney General or as existing on November 1, 1964, and unchanged at the date of the election on H.C.R. No. 41 to that date,[14] is tedious but is relatively clear in context. Put simply, some provisions of state law regarding the preparation and content of ballots are directed to the State Board of Election Commissioners and in particular the Secretary of State, and define their specific duties regarding same; the vast majority of provisions of state law regarding ballots are directed to local county election officials who actually conduct elections. With respect to the ballot, Miss. Code Ann § 23-5-3 describes the composition of the county boards of election commissioners and provides that it

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[14] There was no claim in the district court that any formal change in the written laws of the state regarding ballots by way of amendment, repeal, etc., had occurred and had not been submitted for preclearance. It should be noted, however, for the Court's information, that the *entire* election code of Mississippi has been totally revamped and, as approved by the Attorney General in December 1986, became effective as state law on January 1, 1987. Accordingly, the statutes cited in this section refer to the code sections as they existed prior to January 1, 1987, regardless of the tense used in the text. All statutes referred to in this section are set forth in Supplemental Appendix B, SA-3 through SA-13, in their pre-January 1, 1987 form.

"shall be the duty of the chairman [of the county election commissioners] to have the official ballot printed and distributed at each general or special election." Miss. Code Ann. § 23-5-139 states that the "size, print, and quality of the *paper of the official ballot* is left to the discretion of the officer charged with printing the official ballot" and further provides that it is the duty of a *state* official, the secretary of state, to furnish the designated commissioner of each county a *sample* of the official ballot . . . the *general form of which shall be followed as nearly as practicable.* . . ." (emphasis supplied). The next adjacent section, § 23-5-141, provides that a proposed constitutional amendment "shall be printed on the official ballot" so that the voter can mark his preference for or against the amendment, and § 23-5-142 further defines the duties of the secretary of state to require that that state official "shall have printed on the election ballot the title of the concurrent resolution adopted by the legislature and the proposed change in the Mississippi Constitution of 1890."

In summary, the basic electoral scheme regarding ballots and their contents set forth in Chapter 5 of Title 23 clearly contemplates only the use of *paper* ballots. See §§ 23-5-139 and 23-5-151. With respect to proposed constitutional amendments, the secretary of state prepares a sample official ballot which contains the title and entire text of the proposed amendment, and forwards the sample official ballot to the responsible county election commissioners, who print and distribute the "official" paper ballot and who should follow the general form of the sample "as nearly as practicable."

The *only testimony* presented to the district court at trial regarding this claim *affirmatively indicates that the defendant secretary of state complied to the letter with the foregoing specific duties imposed upon him by state law with regard to the special election on H.C.R. No. 41*, and there is no evidence that he or any other defendant state official, administered, or sought to administer, these

state laws in any changed manner whatsoever. The *sole evidence* presented at trial in this regard was the uncontradicted testimony of Constance Slaughter-Harvey, the Assistant Secretary of State for Elections, whose testimony is set forth in its entirety in the Supplemental Appendix, and the Master's Report as to what in fact occurred in the 33 counties which had the capability to utilize various types of voting machines or devices in the June 1986 election in H.C.R. No. 41. That report reveals that in those various counties either (1) a summary of H.C.R. No. 41 appeared on the ballot *and* the entire text was posted conspicuously, or (2) the entire text was included on the ballot. App. A at 5a. In the context of § 5, the Master's Report, *standing alone*, was meaningless since the appellants failed at trial to present any proof which identified any change in fact from pre-November 1964 practice regarding ballots on proposed amendment or from any practice subsequently approved under § 5. *Perkins*, *supra*. The district court's judgment should be summarily affirmed on this basis.

Moreover, the district court's judgment is supportable under *St. Landry Parish*, *supra*, at least insofar as that case recognizes that a designated state or political subdivision thereof does not necessarily seek to administer a change within the meaning of § 5 each time a local election worker or official deviates in isolated fashion from election laws or procedures which have themselves been approved under § 5. 601 F.2d at 861-865. In this regard, the appellants' current assertion that "the failure to use proper ballots in Mississippi has been 'widely administered with at least the implicit approval of the State' over a number of years", Juris. Stat. at 15, is *patently without factual support* in either the record [15] or in the district court's opinion.

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[15] Notwithstanding the lack of evidence in the record, appellants suggestion that there has been a failure to use "proper" ballots "over a number of years" further underscores their misconception of the role of § 5. In *Perkins*, for example, it is clear that if the City of Canton had in 1969 and thereafter continued to conduct its

Finally, the instant appeal is a particularly inappropriate vehicle in which to resolve appellants' purported "conflict" between the Fifth Circuit opinion in *St. Landry Parish* and *Henderson v. Graddick*, 641 F.Supp 1192 (M.D. Ala. 1986), in that: (1) the district court in the instant case did not specifically find that *any defendant state official* had violated, or affirmatively urged a violation of, state law regarding the content of the ballot on H.C.R. No. 41; (2) notwithstanding the district court's cursory observation that "state law required that the proposed constitutional amendment be printed in full on the ballot", App. 5a, no provision of state law expressly and specifically precluded county election officials[16] in those counties where voting machines and devices are used from placing the title summary of H.C.R. No. 41 on the physical ballot with the entire text posted conspicuously. The most plausible construction of state law suggests that these actions of the responsible county officials were not impermissible under the relevant statutes.[17] Under § 23-7-1 of the article dealing with voting machines, for ex-

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elections pursuant to its pre-1964 practices, even though such practices would have been in contravention of existing state law, there would have been no change to trigger § 5 scrutiny. 400 U.S. at 394-395.

[16] No county election commissioner was made a party defendant in this action.

[17] The relevant Mississippi statutes regarding the use of voting machines or electronic voting systems are set forth in the Supplemental Appendix at ——. Under these laws, either as approved by the Attorney General or as existing on November 1, 1964, and unchanged at the time of the election, counties in Mississippi have the option of purchasing or renting various types of "voting machines" or "electronic voting systems" which may be used exclusively or in combination with paper ballots at all elections. § 23-7-3, 23-7-5 (voting machines); §§ 23-7-303, 23-7-307 (electronic voting systems). In summary, both of these articles supplement the basic election law which contemplates the use of paper ballots, § 23-7-9 and § 23-7-303, both define the "ballot" in its various aspects where voting machines and electronic systems are in use, § 23-7-1 and § 23-7-301, and both require by reference that the

ample, the term "official ballot" is defined to mean the "printed strips of cardboard containing the names of the candidates nominated and *a statement* of the questions submitted." (emphasis supplied). In any event, the best that can be said in favor of appellants is that state law is "unclear", *cf. Lockhart.* In this case, it provides a particularly hazy backdrop by which to measure the conduct or practices of the responsible county election officials, none of whom were party defendants.

In summary, the benchmark pre-November 1964 practices of the responsible county election officials regarding the contents of the physical ballot on proposed amendments in counties where voting devices are utilized were not established; there was no proof that the defendant state officials administered or sought to administer any change in practice; and the instant appeal provides no occasion for this Court to resolve any issue of substantial significance. Further argument is not warranted.

## IV. THE DISTRICT COURT CORRECTLY FOUND THAT THE DATE OF ELECTION OF H.C.R. NO. 41 DID NOT IN FACT CAUSE A DENIAL OF ACCESS TO THE POLITICAL PROCESS.

With respect to plaintiffs' claim under § 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, the district court found as a fact that the state practice complained of—the June 1986 date of ratification election on H.C.R. No. 41—did not cause a denial to plaintiffs of equal access to the political process by virtue of a shortened period in

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chairman of the various county boards of election commissioners are responsible for the preparation of the official ballot to be used upon the machine or in conjunction with an electronic voting system, 23-7-21 and § 23-7-311; see also § 23-5-3 and § 23-5-123. Moreover, both articles regarding voting machines and electronic systems recognize that space limitations may dictate the physical characteristics and composition of the ballot and ballot labels where devices are used, § 23-7-9 and § 23-7-309.

which to campaign against the measure.[18] The lack of a campaign and accompanying information to the electorate concerning H.C.R. No. 41 was not in fact attributable to state action regarding the election date, but instead was "self imposed" due to a deliberate decision on the part of plaintiffs not to campaign or attempt to educate voters. App. 27a-29a. Cf. *Rosario v. Rockerfeller*, 410 U.S. 752, 758 (1973). The district court's finding was based on causation, rather than on any theory or finding of "estoppel." The district court further found that no campaign to educate voters would have been waged by plaintiffs even if the election had been held in November, that there was no evidence of a campaign by any white group on H.C.R. No. 41, that if any misinformation as to the substantive effects of the tax amendment went to the voters it went to all, both black and white, and that the percentage of black voters participating in the election was equal to, if not higher than, the percentage of such white voters.[19] App. A at 26a-29a. The district court carefully assessed the relevant circumstances surrounding the use of a June date of election of H.C.R. No. 41 and determined that it did not in fact constitute an "episode" of racial discrimination in voting under § 2 as amended.[20]

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[18] The district court expressed severe reservations about the plaintiffs' to launch this claim under § 2. App. A at 17a-21a. Given all the circumstances, that determination was incorrect, and the Court should dismiss the question posed for lack of jurisdiction.

[19] Moreover, as the Court noted with respect to the testimony of plaintiffs' expert, a higher percentage of blacks voted for H.C.R. No. 41 than did whites. App. A at 21a.

[20] The 1982 amendment to § 2 was aimed primarily, though not exclusively, at state-imposed permanent structural barriers, such as multi-member districts, which may result in the *dilution* of black voting strength under the totality of the circumstances so that the opportunity of a cohesive group of minority voters to participate in the electoral process and to elect a candidate of their choice is impaired. The well-known *White-Zimmer* factors of proof were adopted by Congress in the 1982 amendment in order to deal with those permanent structural barriers. In § 2 parlance, the plaintiffs' challenge in this case was directed exclusively toward an "episode"

The district court, rightly or wrongly, accepted the appellant's *theory* of the case as stating a claim under § 2 as amended. In essence, the sole argument now presented to this Court by appellants is that the district court, having accepted their view of the law, was somehow obligated to ignore the concrete facts that were presented to it and to find in plaintiffs' favor. The appellants have already had one "main event" with respect to their strained interpretation of the facts, and under the appropriate appellate review function they are not entitled to another. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). Appellees respectfully submit that further argument in this Court of the fact-specific issue faced by the court below is unwarranted.

## V. THE COURT LACKS JURISDICTION TO REVIEW THE DISTRICT COURT'S FINDINGS AS TO THE APPELLANTS' FOURTEENTH AMENDMENT CLAIMS, AND, IN THE ALTERNATIVE, THOSE FINDINGS ARE NOT CLEARLY ERRONEOUS.

In Section V of their Jurisdiction Statement, Juris. Stat. at 22, the appellants assert that the three-judge district court "erred in failing to find a discriminatory purpose on the part of the State in enacting and administering" the various tax measures challenged under the Equal Protection Clause. A jurisdictional bar, however, not directly attacked by appellants in their Jurisdictional Statement, precludes the Court's review of the merits of the question posed. Moreover, even if the initial jurisdictional problem is ignored—and Appellees submit it should not be—the district court's findings of fact on the merits can-

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of alleged discrimination in voting under § 2, rather than a permanent structural barrier. *See generally, Welch v. McKenzie*, 765 F.2d 1311, 1315-1316 (5th Cir. 1985). As observed in the Senate Committee Report on the 1982 amendment, an alleged "episodic" violation "would not necessarily involve the same [White-Zimmer] factors of proof as the courts have utilized when dealing with permanent structural barriers." Senate Report, Vol. 2 1982 U.S. Code Cong. and Adm. News at p. 207.

not be said to be clearly erroneous under the appropriate appellate review function as defined in *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

Prior to the trial of this cause, the appellees asserted, *inter alia*, that the Tax Injunction Act, 28 U.S.C. § 1341, precluded that district court from exercising subject-matter jurisdiction over the substantive fourteenth amendment equal protection challenges to S.C.R. No. 519, H.C.R. No. 41, and H.B. No. 388 In its November 17, 1986, Order on appellees motion for summary judgment, App. at 47a, the district court held this question under advisement and carried it with the trial on the merits. The parties thus litigated at the trial the appellants' fourteenth amendment claims that the tax measures were enacted for a racially-discriminatory purpose. Subsequent to trial, the district court ruled against the appellants on alternative bases. It held (1) that the Tax Injunction Act did indeed bar the plaintiff's fourteenth amendment claims and those claims would be dismissed for lack of jurisdiction, and (2) that in the alternative, as to the merits, there was no intent to discriminate on the basis of race with respect to the subject legislation. App. at 33a, 15a. *See, e.g., Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981); *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); *United Gas Pipe Line Co. v. Whitn[illegible]*, 595 F.2d 323 (5th Cir. 1979).

In their Jurisdictional Statement, the appellants do not set forth the district court's ruling on jurisdiction as one of the "substantial" questions upon which further review by this Court is warranted. In a footnote, they do mention in cursory fashion that the district court erred in applying the Tax Injunction Act because "neither the [district court] nor the State has ever identified" a "plain, speedy and efficient" remedy in the state court. Juris. Stat. at 28 n.34. The district court in fact cited in its opinion *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973), which reviews Missis-

sippi law and hold that the courts of that state provide such a remedy for Fourteenth Amendment claims, *id.* at 28-29. There is no argument whatsoever presented to this Court that the lower court was wrong in this holding. Absent some articulated claim of error as to the threshold issue of jurisdiction, the Court should not consider the merits of the question the appellants seek to present.

Given the foregoing posture, it is unnecessary at this juncture to reargue the evidence as if this Court sits as the initial trier of fact or to correct every overstatement [21] tossed off by appellants in their Jurisdictional Statement. The opinion of the three-judge district court speaks for itself. Therein, the district court reviewed the evidence concerning the basic historical background, the objective circumstances, and legislative process regarding the ad valorem taxation of Grand Gulf, summarized the live testimony of witnesses and of key legislators who were instrumental in the tax legislation, studied deposition testimony, and by its own description, "plowed through tons . . . of paper." [22] App. 2a-3a, 9a-16a, 29a-30a. It found as a fact that there was *no* racially dis-

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[21] For example, Appellants suggest at Juris. Stat. 24 that Claiborne County was "handed the smallest feasible share of the smallest feasible pie" under H.B. No. 388. The fact of the matter, of course, is that under H.B. No. 388, Claiborne County as situs county receives the lion's share of all in lieu tax revenue generated by the Grand Gulf Plant. Under the terms of the statute, the utility pays not less than $16,000,000 to the State Tax Commision, and of those monies, Claiborne County receives 50 percent off the top for fiscal year 1987, phased down to 30 percent for fiscal year 1991 and thereafter. In addition, Claiborne County, like the other counties in the MP&L service district, also receives a share of the remainder based on a formula for energy consumed. See App. at 81a-83a. It is accordingly more accurate to say that the massive tax windfall for Claiborne County occasioned by the location of Grand Gulf has been reduced to a more modest windfall.

[22] Those "tons of paper" included, among other things, the reports of legislative committees, statistical information provided the legislature by the State Tax Commission, and a transcript of the legislative debates on the measures.

criminatory intent or purpose with regard to the enactments. See *Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252 (1977). That basic finding of course, is subject under F.R.Civ.P.Rule 52(a) to the deferential clearly erroneous standard of appellate review. *Anderson v. Bessemer City*, 470 U.S. 564, 573-575 (1985); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 287-290 (1982). As set forth in *Anderson*, "where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." 470 U.S. at 574. The district court's view of the evidence with respect to the issue of alleged discriminatory intent was manifestly "permissible", and appellants have presented no substantial argument that it was not. This is particularly true in light of the fact that a substantial number of the counties in the service district which will benefit from the distribution under H.B. No. 388 themselves have, like Clairborne County, a black majority population. E.g., Sunflower (62.0%), Leflore (59.1%), Humphreys (65.6%), Jefferson (82.0%).

Further, with respect to the Appellant's contention that the district court somehow failed to follow *Hunter v. Underwood*, 471 U.S. 222 (1985), only two brief observations need be made. First, *Hunter*, itself a fact-specific case, does not purport to direct the district courts as to *how* to find the facts, or what specific conclusions they should ultimately reach, in any of the wide variety of cases in which discriminatory motivation is the touchstone issue of fact. The Court has, in *Arlington Heights*, set forth illustrations of the subjects and materials that may be helpful to the district courts in conducting this inquiry, and it is beyond question in the instant case that the district court had before it and considered those subjects and materials, including the live testimony of key legislators, see *Anderson*, 470 U.S. at 574-575 Second, once the district court had reviewed all the evidence presented in the case and made its bottom-line finding that there was no

racial motivation with regard to the enactments,[23] there was no further analysis for it to undertake; this was not a case in which the district court found a mixed-motive with regard to the enactments so that further scrutiny would be required. *Cf., Arlington Heights*, 429 U.S. at 270 n.21 and accompanying text.

In summary, the jurisdictional issue should preclude the Court's review of the merits of the question the Appellants seek to pose, and that question is itself lacking in such substantiality as to require further briefing or argument.

## VI. THE COURT LACKS JURISDICTION TO REVIEW THE DISTRICT COURT'S PURPORTED RELIANCE ON "POLITICAL CLOUT" AS A LEGITIMATE STATE INTEREST, AND IN ANY EVENT THE QUESTION APPELLANTS SEEK TO POSE IS PATENTLY INSUBSTANTIAL.

Finally, appellants assert that the district court erroneously found "political clout to be a legitimate state interest under the Equal Protection Clause." For the same reasons set forth above at pp. 24-25, the district court's alternate ruling as to the applicability of the Tax Injunction Act, basically unchallenged by appellants before this Court, precludes review of this issue. In any event, the question presented is patently insubstantial. First, the appellants mischaracterize the district court's opinion. Second, the cases relied upon by appellants, *Zobel v. Williams*, 457 U.S. 55 (1982), and *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) are manifestly inapposite. *Zobel* involved a dividend-distribution law which rewarded citizens based on length of residence in the state, and *Metropolitan* involved a domestic preference tax imposed on out-of-state insurance companies. Neither involved the type of property tax and tax revenue distribution meas-

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[23] *Cf., United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 715-716 (1983).

ures found to be rational by the district court in the instant case. *See generally, Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1979); *see also Salsburg v. Maryland*, 346 U.S. 545, 550 (1954) (Equal Protection Clause relates to "equality between persons as such rather than equality between areas").

## CONCLUSION

For the reasons set forth above, appellees respectfully submit that the questions posed are so unsubstantial as to require no further argument, or, in the alternative, that the Court lacks subject matter jurisdiction to review the question. Accordingly, appellees request that the judgment of the district court be summarily affirmed or that this appeal be dismissed as may be appropriate. Moreover, to the extent that the Court deems that any question requires further argument, appellees would request that any notation of probable jurisdiction limit or specify the issues that the Court will hear on the merits.

Respectfully submitted,

EDWIN LLOYD PITTMAN
Attorney General
State of Mississippi
T. HUNT COLE, JR.
(Counsel of Record)
ROBERT E. SANDERS
RICHARD G. JONES

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680
*Attorneys for Appellees*

# SUPPLEMENTAL APPENDIX

## SUPPLEMENTAL APPENDIX A

### 28 C.F.R. § 12 (1986)

**§ 51.12 Examples of changes.**

Changes affecting voting include, but are not limited to, the following examples:

(a) Any change in qualifications or eligibility for voting.

(b) Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting.

(c) Any change with respect to the use of a language other than English in any aspect of the electoral process.

(d) Any change in the boundaries of voting precincts or in the location of polling places.

(e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).

(f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).

(g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

(h) Any change in the eligibility and qualification procedures for independent candidates.

(i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices).

(j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.

(k) Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of Section 5.

## SUPPLEMENTAL APPENDIX B

## MISSISSIPPI CODE ANNOTATED (1972)*

### § 23-5-3. Election and term of office of county election commissioners—qualification of candidates—authority of board of supervisors—organization and duties of commissioners.

At the general election in 1968, and every four (4) years thereafter, there shall be elected five (5) commissioners of election for each county, whose terms of office shall commence on the first Monday of January following their election and who shall serve for a term of four (4) years. Each of the commissioners, before acting, shall take and subscribe the oath of office prescribed by the constitution and file the same in the office of the clerk of the chancery court, there to remain. While engaged in their duties, the commissioners shall be conservators of the peace in the county, with all the duties and powers of such.

The qualified electors of each supervisors district shall elect, at the general election in 1980 and every four (4) years thereafter, in their district one (1) commissioner of election. No more than one (1) commissioner shall be a resident of and reside in each supervisors district of the county; it being the purpose of this section that the county board of election commissioners shall consist of one (1) person from each supervisors district of the county and that each such commissioner be elected from the supervisors district in which he resides.

Candidates for county election commissioner shall qualify by filing with the clerk of the board of supervisors of their respective counties a petition personally signed by not less than fifty (50) qualified electors of the supervisors district in which they reside, requesting that they be a candidate, not less than sixty (60) days before the

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* See Motion to Affirm, p. 17 at n.14.

election and unless such petition is filed within said time, their names shall not be placed upon the ballot. All candidates shall declare in writing their party affiliation, if any, to the board of supervisors, and such party affiliation shall be shown on the official ballot.

The petition shall have attached thereto a certificate of the registrar showing the number of qualified electors on each petition, which shall be furnished by the registrar on request. The board shall determine the sufficiency of the petition, and if the same shall contain the required number of signatures and be filed within the time required, the president of the board shall certify the same to the chairman or secretary of the county election commission and the names of the candidates shall be placed upon the ballot for the ensuing election. No county election commissioner shall serve or be considered as elected unless and until he has received a majority of the votes cast for the position or post for which he is a candidate. If such majority vote is not received in the first election, then the two (2) candidates receiving the most votes for each position or post shall be placed upon the ballot for a second election to be held two (2) weeks later in accordance with appropriate procedures followed in other elections involving runoff candidates.

Upon taking office, the count board of election commissioners shall organize by electing a chairman and a secretary.

It shall be the duty of the chairman to have the official ballot printed and distributed at each general or special election.

**§ 23-5-123. Official ballot; expense of printing.**

The ballots in all elections shall be printed and distributed at the public expense, and shall be known as "official ballots." The expense of printing such ballots shall be paid out of the county treasury, except that in municipal elections such expenses shall be paid by the respective cities, towns, and villages.

**§ 23-5-139. Arrangement of names on ballots; sample ballots.**

The arrangement of the names of the candidates, and the order in which the titles of the various offices shall be printed, and the size, print, and quality of paper of the official ballot is left to the discretion of the officer charged with printing the official ballot; but the arrangement need not be uniform. It is the duty of the secretary of state, with the approval of the governor, to furnish the designated commissioner of each county a sample of the official ballot, not less than fifty (50) days prior to the election, the general form of which shall be followed as nearly as practicable: provided that in all primary elections the names of the candidates for each office separate shall be arranged alphabetically.

**§ 23-5-141. Further as to form of ballots; constitutional amendments, etc.**

Whenever the question of a constitutional amendment, or other question or matter admitting of an affirmative or negative vote, is submitted to a vote of the electors, the amendment, question, or matter, shall be printed on the official ballot, together with the names of the candidates, if any, and also the words "for" and "against," to be so arranged by the proper officer that the voter can intelligently vote his preference, by making a cross mark (X) opposite the word indicating his preference. And immediately following the title of each office shall be printed the words "vote for one," or "vote for two," or more, according to the number to be elected.

**§ 23-5-142. Further as to the form of ballots; title of legislative concurrent resolution.**

The secretary of state shall have printed on the election ballot the title of the concurrent resolution adopted by the legislature and the proposed change in the Mississippi Constitution of 1890.

**§ 23-5-151. Voting; ballot to be marked with ink, and folded.**

On receiving his ballot, the voter shall forthwith go into one of the voting compartments, and shall there prepare his ballot by marking with ink on the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled or by filling in the name of the candidate substituted in the blank space provided therefor, and marking a cross (X) opposite thereto, and likewise a cross (X) opposite the answer he desires to give in case of an election on a constitutional amendment or any other question or matter. As an alternative method, a voter may, at his option, prepare his ballot by marking with ink or indelible pencil in the appropriate margin or place a check, in the form of and similar to a "V", opposite the name of the candidate of his choice for each office to be filled, or by filling in the name of the candidate substituted in the blank space provided therefor, and marking a check, in the form of and similar to a "V", opposite thereto, and likewise a check, in the form of and similar to a "V", opposite the answer he desires to give in case of an election on a constitutional amendment or other question or matter, either of which methods of marking, whether by a cross (X) or by a check in the form of and similar to a"V", is authorized, except that the voter must use either one of said methods throughout his ballot. Before leaving the voting compartment, the voter shall fold his ballot without displaying the markings thereof, but so that the words "official ballot," followed by the designation of the election district and the date of the election, shall be visible to the officers of the election. He shall then cast his ballot by handing the same to one of the managers of the election for deposit in the ballot box; this he shall do without undue delay, and as soon as he has voted, he shall quit the inclosed place at once. A voter shall not be allowed to occupy a voting compartment already occupied by another

voter, nor any compartment longer than ten minutes, if other voters be not waiting, nor longer than five minutes if other voters be waiting. A person shall not be allowed in the room in which the ballot boxes, compartments, tables, and shelves are, except the officers of the election and those appointed by them to assist therein.

**§ 23-7-1. Definitions.**

The list of candidates used or to be used on the front of the voting machines for an election district in which a voting machine is used pursuant to law shall be deemed official ballots under this article. The word "ballot" as used in this article (except when reference is made to irregular ballots) means that portion of the cardboard or paper or other material within the ballot frames containing the name of the candidate and the designation of the party by which he was nominated, or a statement of a proposed constitutional amendment, or other question or proposition with the word "yes" for voting for any question or proposition, and the word "no" for voting against any question. The term "question" shall mean any constitutional amendment, proposition, or other question submitted to the voters at any election. The term "official ballot" shall mean the printed strips of cardboard containing the names of the candidates nominated and a statement of the questions submitted. The term "irregular ballot" shall mean a vote cast, by or on a special device, for a person whose name does not appear on the ballots. The term "voting machine custodian" shall mean the person who shall have charge of preparing and arranging the voting machine for elections. The term "protective counter" shall mean a separate counter built into the voting machine which cannot be reset, which records the total number of movements of the operating lever. The term "officials in charge of the election" shall mean the state election commissioners, the county election commissioners, the county executive committee, the municipal election commissioners, the municipal executive committee, or any

other official or officials empowered by law or who may in the future be empowered by law to hold an election.

**§ 23-7-3. Purchase or rental of voting machines—requirements.**

The board of supervisors of any county in the State of Mississippi and the governing authorities of any municipality in the State of Mississippi are hereby authorized and empowered, in their discretion, to purchase or rent any voting machine or machines which shall be so constructed as to fulfill the following requirements: It shall secure to the voter secrecy in the act of voting; it shall provide facilities for voting for all candidates of as many political parties or organizations as may make nominations, and for or against as many questions as submitted; it shall, except at primary elections, permit the voter to vote for all the candidates of one party or in the part for the candidates of one or more other parties; it shall permit the voter to vote for as many persons for an office as he is lawfully entitled to vote for, but not more; it shall prevent the voter from voting for the same person more than once for the same office; it shall permit the voter to vote for or against any question he may have the right to vote on, but no other; it shall be so constructed and equipped with devices or attachments as to comply with the "single shot" provisions of the Mississippi election laws, whenever and wherever such provisions are applicable; if used in primary elections, it shall be so equipped that the election officials can lock out all rows except those of the voter's party by a single adjustment on the outside of the machine; it shall correctly register or record, and accurately count all votes cast for any and all persons, and for or against any and all questions; it shall be provided with a "protective counter" or "protective device" whereby any operation of the machine before or after the election will be detected; it shall be provided with a counter which shall show at all times during an election how many persons have voted; it shall be provided with a

mechanical model, illustrating the manner of voting on the machine, suitable for the instruction of voters; it may also be provided with one device for each party, for voting for all the presidential electors of that party by one operation, and a ballot therefor containing only the words "Presidential Electors For" preceded by the name of that party and followed by the names of the candidates thereof for the offices of President and Vice President, and a registering device therefor which shall register the vote cast for said electors when thus voted collectively; provided, however, that means shall be furnished whereby the voter can cast a vote in part for the candidates for presidential electors of one party, and in part for those of one or more other parties or in part or in whole for persons not nominated by any party.

**§ 23-7-5. Discretionary use of machines—use of combinations of voting systems in same election.**

Whenever the board of supervisors of any county or the governing authorities of any municipality shall purchase or rent voting machines that meet the requirements of this article, such voting machines may be used at all elections held in such county or municipality, or in any part thereof, for voting, registering and counting votes cast at such elections. In providing voting machines, the board of supervisors is hereby empowered to purchase or rent voting machines for each voting precinct in the entire county, including those located within the municipality, or, in the discretion of the board, voting machines may be purchased or rented only for those voting precincts located outside the limits of the municipalities located in said county. The board of supervisors of any county and the governing authorities of any municipality may jointly purchase or rent voting machines for all of the voting precincts in the entire county. Whenever voting machines have been purchased or rented by either the board of supervisors or the governing authorities of a municipality, for use at voting precincts within the county or within the

municipality, said voting machines may be used at said voting precincts in all elections, and the officials in charge of the election to be held shall cause the voting machines to be prepared and used at such election as provided for herein. Voting machines of different kinds may be adopted for different counties within the state.

**§23-7-9. Ballots—arrangement of names.**

All ballots for use in voting machines shall be furnished by the same officer whose duty it is to furnish regular ballots and shall be printed on paper or clear white material, of such form and size as will fill the ballot frames of the machines, in plain color type as large as the space will reasonably permit. The names of the candidates for each office shall be arranged on each voting machine, either in columns or horizontal rows; the caption of the various ballots on said machines shall be so placed on said machines as to indicate to the voter what key lever or other device is to be used or operated in order to vote for the candidate or candidates of his choice. The order of the arrangement of parties and of candidates shall be as now required by law.

**§ 23-7-21. Official ballots, preparation of.**

Official ballots of the form and description set forth in this article for use upon voting machines shall be prepared and furnished in the same manner, at the same time, and be delivered to the same officials as now provided by law.

**§ 23-7-301. Definitions.**

As used in this article, unless otherwise specified:

"Automatic tabulating equipment" includes apparatus necessary to automatically examine and count votes as designated on ballots or ballot cards and tabulate the results.

"Ballot card" means a tabulating card on which votes may be recorded by means of punching or marking.

"Ballot labels" means the cards, papers, booklets, pages, or other material, containing the names of offices and candidates and the statements of measures to be voted on, which are placed on the voting device.

"Ballot" means a paper ballot on which votes are recorded, or alternatively may mean ballot cards and ballot labels.

"Counting center" means one or more locations used for the automatic counting of ballots.

"Electronic voting system" means a system in which votes are recorded on a paper ballot or ballot cards by means of marking or punching, and such votes are subsequently counted and tabulated by automatic tabulating equipment at one or more counting centers.

"Voting device" means an apparatus which the voter uses to record his votes by marking or punching a hole in a paper ballot or tabulating card, which votes are subsequently counted by electronic tabulating equipment.

**§ 23-7-303. Authorization of acquisition and use of electronic voting system.**

The board of supervisors of any county in the State of Mississippi and the governing authorities of any municipality in the State of Mississippi are hereby authorized and empowered, in their discretion, to purchase or rent voting devices and automatic tabulating equipment used in an electronic voting system which meets the requirements of section 23-7-305, and may use such system in all or a part of the precincts within its boundaries, or in combination with paper ballots in any election or primary. It may enlarge, consolidate or alter the boundaries of precincts where an electronic voting system is used. The provisions of this article shall be controlling with respect to elections where an electronic voting system is used, and

shall be liberally construed so as to carry out the purpose of this article. The provisions of the election law relating to the conduct of elections with paper ballots, insofar as they are applicable and not inconsistent with the efficient conduct of elections with electronic voting systems, shall apply. Absentee ballots shall be voted as now provided by law.

**§ 23-7-307. Equipment may be used at all elections.**

Whenever the board of supervisors of any county or the governing authorities of any municipality shall purchase or rent voting equipment that meets the requirements of this article, such voting equipment may be used at all elections held in such county or municipality, or in any part thereof, for voting, registering, or counting votes cast at such elections as provided by section 23-7-5, Mississippi Code of 1972, with respect to voting machines.

**§ 23-7-309. Ballots and ballot labels.**

Ballots and ballot labels shall, as far as practicable, be in the same order of arrangement as provided for paper ballots, except that such information may be printed in vertical or horizontal rows, or in a number of separate pages which are placed on the voting device. Ballot labels shall be printed in plain clear type in black ink and upon clear white materials of such size and arrangement as to fit the construction of the voting device. Arrows may be printed on the ballot labels to indicate the place to punch the ballot card, which may be to the right or left of the names of candidates and propositions. The titles of offices may be arranged in vertical volumns on in a series of separate pages, and shall be printed above or at the side of the names of candidates so as to indicate clearly the candidates for each office and the number to be elected. In case there are more candidates for an office than can be printed in one column or one ballot page, the ballot or ballot label shall be clearly marked that the list of candidates is continued on the following column or page, and,

so far as possible, the same number of names shall be printed on each column or page. The names of candidates for each office shall be printed in vertical columns or on separate pages, grouped by the offices which they seek. In partisan elections, the party designation of each candidate, which may be abbreviated, shall be printed following his name.

Two sample ballots, which shall be facsimile copies of the official ballot or ballot labels, and instructions to voters, shall be provided for each precinct and shall be posted in each polling place on election day.

Sample ballots may be printed on a single page or on a number of pages stapled together. A separate write-in ballot, which may be in the form of a paper ballot, card or envelope in which the voter places his ballot card after voting, shall be provided if required to permit voters to write in the title of the office and the name of a person not on the printed ballot for whom he wishes to vote.

**§ 23-7-311. Ballots and supplies.**

The official ballots, ballot labels, ballot cards, sample ballots, and other necessary forms and supplies of the form and description required by this article or required for the conduct of elections with an electronic voting system shall be prepared and furnished by the same officials, in the same manner and time, and delivered to the same officials as provided by law with respect to paper ballots. If ballot cards are used, each card shall have a serially numbered stub which shall be removed by an election officer before being deposited in the ballot box, and suitable envelopes shall be provided to enclose the voted ballot card when it is returned to the election officers for deposit in the ballot box.

**SUPPLEMENTAL APPENDIX C**

**Tr. 533-54**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

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Civil Action No. J86-0373(L)

EDDIE BURRELL, *et al.*,
*Plaintiffs*

vs.

WILLIAM A. ALLAIN, *et al.*

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TRANSCRIPT OF TRIAL

VOLUME III

Jackson, Mississippi
November 24, 25 and 26, 1986
Honorable E. Grady Jolly, Jr.
Honorable Tom S. Lee
Honorable Henry T. Wingate

APPEARANCES:

For the Plaintiffs:

Mr. Michael B. Wallace
Mr. Clifton Hodge
Ms. Jean H. Sansing

For the Defendants:

Mr. Robert Sanders
Mr. T. Hunt Cole
Mr. Richard G. Jones

* * * *

CONSTANCE SLAUGHTER HARVEY,
first being sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. COLE:

Q State your name, please.
A Constance Slaughter Harvey.
Q Where do you live, Ms. Harvey?
A I live in Forest.
Q Have you always lived in Forest?
A For the better part of my life, yes.
Q Where did you attend high school?
A E. T. Hawkins in Forest.
Q And did you attend college?
A Yes. I attended Tougaloo College in Tougaloo.
Q And did you have any further educational training?
A I graduated from the University of Mississippi School of Law in January of 1970.
Q And I believe it's correct that you had the honor of being the first black female graduate of the law school at Ole Miss. Is that correct?
A If that's an honor, yes.
Q Now, what is your present occupation?
A My occupation is Assistant Secretary of State for Public Lands and Elections.
Q And let me ask you this: Had you had any prior experience in state government?
A Yes. I was director of the Governor's Office of Human Development from February 1980 to January 4th of 1984.
O Now, tell the court what you do in your capacity as Assistant Secretary of State for Elections.
A I am responsible for coordinating the Secretary of State's responsibilities under the statutes as they relate to elections. That primarily would include serving as his liaison with the State Board of Election Commissioners and receiving certifications from local entities regarding

elections. Additionally, we are responsible for receiving and verifying fee-paid forms that come into our office and providing technical assistance to the public and public officials as that assistance would relate to elections.

Q Does the Secretary of State's office have any duties with respect to the ballot?

A Yes, sir. As a member of the State Board of Election Commissioners, the Secretary of State has been designated informally, I believe, as the secretary to the Commission; and in that role, we do the actual work, along with the Attorney General's office. We prepare the agenda with the approval of the Attorney General's office and the Governor's office. We prepare and bring to the meetings, after having made appropriate copies, the affidavits and certifications that are required to be filed in certain cases. We make certain that the commission has all the information that it needs in order to make an intelligent decision.

Q What do you do with respect to the ballot when a proposed constitutional amendment has been adopted by the legislature?

A Well, the procedure now is somewhat different than it was for the June 3rd election.

Q Let's focus our attention on generally what the Secretary of State's office does in that regard before we turn to June 3rd.

A Generally we get copies—attested copies of the concurrent resolution and have those copies prepared for review by the Election Commission. We contract with printers as necessary to make certain that they are able to print on a timely basis and get those particular amendments—concurrent or proposed amendments out to the public and out to public officials as mandated by law.

Q And what is it actually that the Secretary of State's office prepares with respect to the ballot on a proposed constitutional amendment?

A We prepare a copy of the proposed amendment.

Q Yes.

A And we also prepare instructions to the Circuit Clerks and Election Commissioners, with the assistance of the Attorney General's office.

Q Now, is that what's call the sample official ballot?

A Yes, sir.

Q Explain to the court how that process works.

A Well, it's a very simple process. The legislature passes the resolution. It is then sent to the documents division of the Secretary of State's office for official record-keeping. When we get ready to have a meeting of the State Board of Election Commissioners, we ask for a copy of the original resolution. We get it xeroxed, and we lay it out, if necessary. If there are two amendemnts, we put them side by side; and if there is space at the bottom for instructions, we do that. If not, we have to use another page. It's a very, very simple, very ministerial job.

Q And then what does the Board of Election Commissioners do?

A The State Board of Election Commissioners—We generally try to give them an agenda beforehand. They look at it, they ask questions as they always do, and we try to be as responsive as possible. If they have concerns about the proposed order of the ballot, as they almost always do, then order of the ballot is changed.

Q Now, after the Board of Election Commissioners approves the sample official ballot, what occurs then?

A Then the sample official ballot is then distributed to the Election Commissioners in the respective counties, and copies are also sent to the Circuit Clerks. That responsibility is in our office.

Q The responsibility of sending the sample official ballot. Is that correct?

A That's correct.

Q I hand you what has been previously marked as P-137 and admitted into evidenec and ask if you can tell us what that is.

A This is the official sample ballot that came from our office after having been approved by the State Board

of Election Commissioners for the June 3rd, 1986, election.

Q And at the bottom of that sample ballot, I believe there are some instructions. Is that correct?

A That's correct.

Q Who exactly do you send these to?

A These are sent to the chairman of the county election commission and to the Circuit Clerks.

Q Now, with respect to the election on June 3rd, 1986, or this ballot, was that done?

A Yes, sir.

Q And I hand you what has been previously admitted into evidence as P-138 and ask you if you can identify that document.

A Yes, sir. This is a copy of the memorandum that I sent to the chairmen of the county Board of Election Commissioners and the Circuit Clerk for each county. It deals with the official sample ballot.

Q And let me ask you about what has been previously marked and admitted into evidenec as P-139.

A This is a supplemental memorandum that was sent to the chairmen of the county Board of Election Commissioners, and it dealt with the recapitulation sheet that we were asking them to complete and return to our office as required by law. We also mentioned in there the *Kirksey v. Allain* lawsuit, because there were questions about—there were confusing questions, and we enclosed a copy of the *Kirksey v. Allain* Order for their clarity and understanding.

Q Let's talk about that just for a moment. The *Kirksey v. Allain* lawsuit involved judicial primary elections in the state of Mississippi. Is that correct?

A That's correct. Yes.

Q And what had occurred in that regard?

A The judge had issued an Order enjoining the elections; and quite a few people thought that there would be no elections of any nature, because I think the press had indicated that "Judge Halts Elections," and we had

received several calls concerning whether or not there would be any elections at all on June 3rd; and our purpose for sharing this information was to make certain that the people in the counties understood that there would in fact be elections, there would be a special election, and that there would be two amendments that the population should vote on, either in favor of a rejection.

Q And for clarification purposes, the court's Order only enjoined certain elections, or did it permit the election to be held but in certain elections the votes would not be tallied?

A In certain county elections, county judgships, certain county judgeships were permitted. In Circuit and Chancery Court judgeships, none were permitted. For me to try to explain to you which counties were exempt and which counties were approved would be difficult at this time. There was confusion. That's the only reason we sent a copy of the court's Order in *Kirksey v. Allain*, so that they could understand for themselves which elections were enjoined and which elections could be held.

Q And the judicial elections were in fact Democratic primary elections. Is that correct?

A I believe so, yes.

Q And the elections that were held on the constitutional amendments were not a part, actually, of that primary election, but that was a separate election conducted at the same time. Is that correct?

A That's correct. The special election—We sent out the official sample ballot, Exhibit 137. That dealt with the special election; and all citizens, regardless of party affiliation, could vote in that election; and we encouraged voter participation in that election. The concern was at that time, though, that some of the Election Commissioners were concerned as to how they would distinguish between the special election and the primary election, both of which were held on the same day; and we referred them to several cases, with the assistance of the Attorney General's office, that indicated that that prac-

tice was in fact permissible. The people had to be certain to make certain that there was no confusion.

Q I believe that some case law is mentioned on the instructions at the bottom of P-137. Is that correct?

A Right. *Barnes v. Barnett*; and I believe in the memorandum that I sent, we also talked about *Barnes v. Ladner*. I'm not sure. Yes. *Barnes v. Ladner*.

MR. COLE: I believe that's all I have. Tender the witness.

JUDGE JOLLY: You may cross-examine.

CROSS EXAMINATION

MR. HODGE:

Q Mrs. Harvey, I'm going to again hand you Exhibit P-137, which is the sample official ballot. As I understand your testimony, this is the document which was sent to the various Election Commissions at the county level in the state of Mississippi. Is that correct?

A Yes, sir, and Circuit Clerks as well.

Q And at the top of each column, there is a paragraph in bold print, larger print than the remaining part of the ballot. Could you tell me what that is. The first paragraph in each column in large print.

A It purports to represent—Make an assumption, which I don't want to do. I assume it's a summary.

Q A summary of the item to be voted upon?

A I assume so, yes, sir.

Q Who prepared that language?

A This was prepared by the legislature. When the resolutions are approved, they are sent over to the Secretary of State's office, documents division; and they are enrolled. When we get ready to prepare the ballot for the population to acton, we make no changes. We copy and print it—by "it," I mean the resolution—as it comes from the Mississippi legislation.

Q So this is just a verbatim copy of what you received from—

A That's correct.

Q —the legislature.

A Yes, sir. And they were in all capital letters. Everything was identical.

Q And isn't it a fact that in some counties only this language which is in the first paragraph of each column was presented to the voters?

A Are we talking—

MR. SANDERS: If it please the court, object to the form of the question unless he explains what he means by "presented to the voters." Does he mean on the ballot or available to the voters in the polling place or—Object unless he clarifies that.

MR. HODGE: I will attempt to clarify it.

MR. HODGE:

Q Mrs. Harvey, isn't it a fact that the first paragraph of each column was the only material on the ballot at the voting places in some counties in the state of Mississippi on the—in connection with the June 3, 1986, election?

A We talked about that during my deposition, and I stated then that I did not know of my own personal knowledge. I still don't know of my own personal knowledge that only the summary was presented. Not of my own personal knowledge. I do not know.

JUDGE JOLLY: That's been stipulated, hasn't it?

MR. SANDERS: The Special Master made a report on it, Your Honor, that's been filed with the court.

JUDGE JOLLY: You don't dispute it.

MR. SANDERS: Oh, no, sir. No, sir.

MR. HODGE:

Q Mrs. Harvey, do you know when the injunction with regard to the judicial elections was issued by the court before the June 3, 1986, election?

A I'm thinking it was like—The election was on the 3rd, on a Tuesday. I believe it was like that—either that Wednesday or that Thursday.

Q Before the election.

A Before the election, yes.

Q And because of that and other factors, there was a considerable amount of confusion in connection with the June 3 election. Is that correct?

A Yes, sir, because of those factors. Yes, sir.

Q In fact, is it not correct that Secretary of State Molpus, on the day before the election—June 2, 1986—issued a press release in which he noted that there were confusing and chaotic factors with regard to that election?

A Yes, sir. He held a press conference the day before the election. The purpose of that press conference was to clarify for voters who might have been confused that there was in fact a special election being held, and there were two amendments to be considered, and there were primaries to be held as well. The Secretary always tries to alert voters that there will be elections. He did this in the past election as well.

Another purpose for having the news conference was to make a prediction as to the number of voters that would participate in the voting process. We were mainly concerned that there was confusion with the general populace as to whether or not there would be elections at all. Because of the court decision in *Kirksey v. Allain*, a lot of people had called in inquiring as to whether or not all elections were halted; and the purpose for the press conference and the press releases—the purpose was to make certain that voters were informed as to the issues that would be put before them on June 3rd.

Q And so, as I understand it, the actions—or at least some of them—of the Secretary of State's office in connection with this confusion were, number one, your memo of

May 28, 1986, citing the cases that the Election Commission could read to get an understanding of it; and number two, Mr. Molpus's press conference on the day before the election. Is that correct?

A I'm not sure I understood your question.

Q All right. As I understand your testimony, one of the reasons for your memo of May 28, 1986, which was sent to the Election Commissioners prior to the election on June 3, was to advise them of the Kirksey case so that they could read it and make their own determination. Is that correct?

A Well, the court told us to send copies. The court in *Kirksey v. Allain* told us to send copies of the court Order to the respective election officials, and we were also told to call them and officially place them on notice as to the action of the court.

Q And this memo which has been marked as Exhibit P-139 which you sent to the Election Commissioners was the only document that was sent from the Secretary of State's office in connection with the *Kirksey v. Allain* case. Is that correct?

A I believe that's correct.

MR. HODGE: I have no further questions.

MR. COLE: No redirect.

JUDGE JOLLY: Judge Wingate has a question he would like to just clarify.

JUDGE WINGATE: You said there was a lot of confusion during this time period?

A Yes, sir.

JUDGE WINGATE: There was also some primaries going on across the state.

A Yes, sir, there were.

JUDGE WINGATE: And could you name some of those primaries?

A There were two contested Supreme Court Judge races. I believe it was in central Mississippi and the southern part of the state. There were also——

JUDGE WINGATE: That was Judge Reuben Anderson?

A Yes, sir, and Rubel Griffin. There were also local primary elections. That was one of the purposes of the press conference. The Secretary had for the first time a list of all races that were—elections that were being held that particular day, and we were sharing that with the press and with the local people. There were quite a few primary races, some of which were not contested.

JUDGE WINGATE: There was also a Congressional primary too, was there not?

A Yes, sir.

JUDGE WINGATE: That was Mr. Espy?

A It was Espy—and there was another one, I believe. I believe there might have been two, two Congressional races that were contested.

JUDGE WINGATE: Thank you.

JUDGE JOLLY: Thank you very much for your testimony, Mrs. Harvey. We appreciate you being here. Call your next witness.

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